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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PARK PLACE ASSOCIATES, LTD., et al., Plaintiffs and Respondents, v. BELL GARDENS BICYCLE CLUB, et al., Defendants and Appellants.	B156644 (Los Angeles County Super. Ct. No. VC034786)

APPEAL from an order of the Superior Court of Los Angeles County. Thomas I. McKnew, Judge. Reversed.

Horvitz & Levy, David J. Gonzalez and Robert H. Wright; Baker, Kenner & Nahra, Robert C. Baker, Melissa S. Fink and E. Todd Trumper for Defendants and Appellants.

Ferruzzo & Ferruzzo, John R. Pelle, Jason D. Cohn and Colleen M. McCarthy for Plaintiffs and Respondents.

This is an appeal from an order disqualifying a law firm, Baker, Keener & Nahra (the firm), from representing certain defendants in a suit brought by one of two joint venturers against, among others, its co-venturer and the joint venture itself. The trial court disqualified the firm from representing the joint venture and the co-venturer, on two grounds: (1) the firm's representation of the joint venture in other, unrelated litigation brought by third parties rendered the current plaintiff venturer a client of the firm as well; and (2) the firm's present representation of the joint venture and one venturer against the other placed it in a position of representing adverse interests. Because the undisputed facts did not establish either an attorney-client relationship between the firm and the plaintiff venturer or a situation of conflicting representation, we reverse the disqualification order.

FACTUAL BACKGROUND

The present case arises from a dispute between the two owner-members of a joint venture, The Bell Gardens Bicycle Club (the club), which operates a card gaming club. The plaintiffs are Park Place Associates, Ltd. (PP), a limited partnership that is one of the two venturers in the club, and Key Play, Inc., PP's general partner. The defendants include the club, its other joint venturer, limited partnership LCP Associates, Ltd. (LCP), and LCP's three individual general partners (Haig Kelegian, Robert Carter, and Walter J. Lack). The lawsuit concerns the club's acquisition of a 47.05 unit share of PP from two of its partners, George Hardie and Kard King, Inc. (KK), who are also defendants but are not parties to this appeal.

The first amended complaint alleged in essence as follows. PP and LCP organized the club in 1983, and before the transfer of interests at issue in this case, PP owned a 35 percent interest in the club and LCP owned 65 percent, enabling it to act as the club's managing partner. In turn, Hardie owned 46.05 of PP's limited partnership units, and KK, owned by Hardie, held one additional unit. Under a 1996 settlement agreement with the California Attorney General's Office, Hardie agreed to divest himself of his interests in PP, by November 2000. Thereafter in September 1999, Hardie, KK, the club, and LCP

entered into an agreement under which the club would acquire Hardie's and KK's interests in PP, for $4 million. The club paid Hardie $1.6 million and, acting through LCP's defendant general partners, it executed a promissory note for the rest, with interest. At least 35 percent of the funds paid for this purchase rightfully belonged to PP.

PP alleged that in selling his units to the club, Hardie breached PP's limited partnership agreement (agreement), which provides that a limited partner who desires to transfer any of his units must first offer them, on the same terms, first to PP's general partner, and then to the other limited partners. The agreement further provides that any sale of PP units not made in accordance with it is void. PP further alleged that after the purported transfer, in further violation of the agreement, the club, acting through LCP, converted Hardie's PP units into a 16.4675 percent interest in the club. It then distributed that interest to PP and LCP, in proportion to their shares in the club, so that their present shares purportedly amount to approximately 78 percent to LCP and 22 percent to PP. Club profits have since been distributed according to this skewed structure.

Based on these allegations, PP asserted causes of action for declaratory relief, specific performance of the agreement, injunction, and accounting, whereby the transfer of Hardie's and KK's units in PP and their redistribution as interests in the club would be rescinded and voided, the units would be offered to PP pursuant to the agreement, and the club would account for the funds paid to Hardie for his units, and the profits distributed to PP and LCP under the new profit-sharing formula. In addition, PP asserted causes of action for compensatory and punitive damages for breach of fiduciary duty, against Hardie and against LCP and its three general partners.

The action was commenced in July 2001. On September 21, 2001, the firm filed an answer to the first amended complaint on behalf of the club, LCP, and its three general partners (hereafter collectively defendants). Two months later, PP and its general partner noticed a motion to disqualify the firm from further representing defendants, on grounds PP itself was a present or former client of the firm. The basis for this contention was that the firm had represented the club as a defendant in four other Los Angeles County

Superior Court cases, brought by club employees concerning employment issues (the employee cases). PP contended that by this representation the firm had become subject to an attorney-client relationship with PP, a partner in the club. (PP apparently had been specifically named as a codefendant in only one of the employee cases, and the firm had not appeared for PP in that case.)

Opposing the motion, defendants argued that in the employee cases the firm had represented only the club, as an entity, and that there was no basis for finding an implied contract creating an attorney-client relationship between the firm and PP, in light of the factors discussed in *Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 (*Responsible Citizens*), and *Johnson v. Superior Court* (1995) 38 Cal.App.4th 463, 476-477 (*Johnson*), on which PP too had relied.[1]

The trial court granted the motion to disqualify the firm, on two related bases. With respect to the facts and factors the parties had advanced, the court ruled that the relevant considerations supported an attorney-client relationship between the firm and PP in the employee cases. Although acknowledging that certain specific factors noted in *Responsible Citizens, supra,* 16 Cal.App.4th 1717, and *Johnson, supra,* 38 Cal.App.4th 463, did not predominate in this respect, the court termed "the primary factor guiding" its conclusion to be that the employee cases "could affect not only the liability of the Club but of both ownership interests as well."

Second, without regard to the employee cases, the court independently concluded that the firm's present representation of the club and LCP as against PP constituted concurrent representation of adverse interests, because the club was "an aggregate of two entities" (PP and LCP), which the firm could not represent "when one of those entities

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[1] In a supporting declaration, the firm's senior partner stated that three of the employment cases had been dismissed or otherwise terminated in the club's favor before PP's motion was filed.

sues the other." The court explained, "the firm cannot fairly represent the interests of both entities and at the same time defend one against the other."

Defendants noticed the present appeal from the disqualification order. They also requested that the trial court recognize or grant a stay of the order pending the appeal. When the court denied that request, defendants petitioned this court for a writ of supersedeas. We stayed the disqualification order and all other trial court proceedings in the case, pending disposition of this appeal.

DISCUSSION

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 (*SpeeDee*).) However, "where there are no material disputed factual issues, the appellate court reviews the court's determination as a question of law." (*Id.* at p. 1144, citing *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 119.) This is such a case. Contrary to PP's assertion, the trial court neither confronted nor resolved disputed questions of fact in deciding the motion. Accordingly, we review the determination independently. (*Ibid.*)

Moreover, the existence of an attorney-client relationship, which formed the basis for the trial court's decision, itself presents a question of law. (*Responsible Citizens*, *supra*, 16 Cal.App.4th at p. 1733.) And "[i]n any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion" (*SpeeDee, supra,* 20 Cal.4th at p. 1144), including both maintenance of ethical integrity within the judicial system and recognition of a client's right to an attorney of choice, unhindered by abusive, tactically based challenges. (See *id.* at p. 1145; *Responsible Citizens*, *supra*, 16 Cal.App.4th at p. 1725.)

We consider first the trial court's conclusion that by appearing for defendants here, the firm impermissibly represented adverse clients, in that PP also was such a client, by reason of the firm's representing the club, in which PP is a partner (venturer), in the employee cases. Such dual representation would violate rule 3-310(C)(2) of the Rules of

Professional Conduct (hereafter cited as rules), which prohibits California lawyers from representing "more than one client in a matter in which the interests of the clients actually conflict." (See also *SpeeDee, supra,* 20 Cal.4th at p. 1147 ["The most egregious conflict of interest is representation of clients whose interests are directly adverse in the same litigation"].) We conclude, however, that the firm's representation of the club in the employee cases did not engender an attorney-client relationship with PP.

The parties agree that *Responsible Citizens*, *supra*, 16 Cal.App.4th 1717, and *Johnson, supra,* 38 Cal.App.4th 463, which followed it, provide the relevant principles for determining whether attorneys who represent a partnership also represent individual members of it in a given situation.[2] The first of these principles is that in California, "representation of a partnership does not, by itself, create an attorney-client relationship with the individual partners." (*Responsible Citizens*, *supra*, 16 Cal.App.4th at p. 1731; accord, *Johnson, supra,* 38 Cal.App.4th at p. 477.) This rule stems in part from rule 3-600(A)'s application of the entity theory (as distinguished from the aggregate theory) of partnership in defining the duties of attorneys representing organizations. (*Responsible Citizens*, *supra*, 16 Cal.App.4th at pp. 1730-1731.)

Responsible Citizens, supra, 16 Cal.App.4th 1717, also recognized that attorneys for a partnership may at times represent one or more partners as well. (*Id.* at p. 1731.) Rule 3-600(E) authorizes this, subject to the conflict provisions of rule 3-310. *Responsible Citizens* further explained that where not imposed by court appointment, such an attorney-client relationship must be created by contract, express or implied from the circumstances. (*Responsible Citizens*, *supra*, 16 Cal.App.4th at p. 1732.) There

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[2] Although this case involves a joint venture, the legal distinction between a joint venture and a partnership is minor and often blurry, and application of rules concerning partnerships is fully appropriate in the present context. (See *Wiener v. Fleischman* (1991) 54 Cal.3d 476, 482; 9 Witkin, Summary of Cal. Law (9th ed. 1989) Partnership, § 17, pp. 415-417.)

being no express contract between the firm and PP with respect to the employee cases, PP contended, and contends, that the circumstances reflected an implied agreement establishing an attorney-client relationship between them as to those cases.

Responsible Citizens, supra, 16 Cal.App.4th 1717, 1733, set forth a nonexhaustive list of factors "which might support, or undercut, implication of an attorney-client relationship with an individual partner in any particular case." These factors were (1) the type and size of the partnership, (2) the nature and scope of the attorney's engagement by the partnership, (3) the kind and extent of contacts, if any, between the attorney and the individual partner, and (4) the attorney's access to information (e.g., partnership financial information) relating to the individual partner's interests. (*Ibid.*; *Johnson, supra,* 38 Cal.App.4th at pp. 476-477.) In addition, the court counseled, "primary attention should be given to whether the totality of the circumstances, including the parties' conduct, implies an agreement by the partnership attorney not to accept other representations adverse to the individual partner's personal interests." (*Responsible Citizens, supra*, 16 Cal.App.4th at p. 1733; *Johnson, supra,* 38 Cal.App.4th at p. 477.)

These factors largely point away from implying an attorney-client relationship between the firm and PP in the employee cases. The two-member size of the partnership in question (the club) does theoretically weigh in support of such a relationship. (Cf. *Responsible Citizens*, *supra*, 16 Cal.App.4th at p. 1732.) But under the undisputed evidence, the remaining factors run contrary, or at least not in favor. There was no evidence of contacts between PP and the firm with respect to the employee cases – other than PP's protest of that lack of contact, and the firm's response that its representation extended solely to the club. Similarly, the firm's engagement by the club with respect to those cases appeared limited to defending the club itself, against charges by its employees that they had been inadequately compensated. And as the trial court noted, there was no

showing that the firm had access to information relating to PP's interests.[3] Finally, the overall circumstances adduced, of the firm's representing the club as an entity in defense of the employee cases, did not indicate any disposition by either the firm or PP regarding the firm's refraining from representing the club or others in cases PP might bring against them.

The trial court, however, took a dispositively different view of the "nature and scope" of the firm's representation of the club in the employee cases. The "primary factor" underlying the court's determination that an attorney-client relationship with PP existed was that those lawsuits, apparently seeking damages or other monetary relief, "could affect not only the liability of the Club but of both ownership interests as well." In other words, the court perceived that the legal potential of the club's member-partners' being liable for an award against the club (see Corp. Code, § 16306, subd. (a); undesignated section references are to that code) warranted or at least militated in favor of recognizing attorney-client relationships between the club's defense attorneys and its members individually. We do not agree.

It is true that as a matter of inchoate obligation, the partners of a general partnership are liable for the obligations of the partnership, "unless otherwise agreed by the claimant or provided by law." (§ 16306, subd. (a).) But as a legal and practical matter, a partner is not subject to a judgment against the partnership, and such a judgment "may not be satisfied from a partner's assets unless there is also a judgment against the partner." (§ 16307, subd. (c).) That requires that the partner be individually sued and served. (Code Civ. Proc., § 369.5.) Moreover, even in such a case, in which a claim on a partnership obligation has been reduced to judgment against both the partnership and a

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[3] Although the court also observed that the firm might conceivably become privy to the club's records with respect to finances and profit distributions, such access was not only contingent but was not shown to bear on any interests of PP extrinsic to the club.

partner, the judgment may not be executed against the partner's assets (absent agreement by the partner) unless the partnership is in bankruptcy, or execution against it has been returned unsatisfied, or the court grants permission based on a finding that the partnership clearly cannot satisfy the judgment or in the exercise of the court's equitable powers. (§ 16307, subd. (d).)

In short, the possibility of PP's suffering personal loss on account of an outcome adverse to the club in the employee cases is entirely theoretical and speculative. Moreover, all members of general partnerships face the same contingent prospect of liability whenever a monetary claim is asserted against the partnership. The trial court's reasoning thus proves far too much: if it were followed, every engagement of counsel to defend a partnership against a monetary claim would per se tend heavily to establish an attorney-client relationship with each partner of the partnership. That would not accord with the view of *Responsible Citizens*, *supra*, 16 Cal.App.4th 1717, and the principles it expounds.

Similarly unavailing are PP's protests that, as a profit participant in the club, it will in any event share one-third in the expense of any judgment collected against the club in the employee cases, and in the firm's fees for defending the club in them. These factors too are common to any situation in which a partnership or joint venture undergoes a monetary claim and pays for defensive legal representation. Without more, they do not inform whether there exists an implied agreement of representation between the partnership's attorneys and an individual partner. Evaluating those concerns that are relevant, we conclude that the firm's representation of the club in the employee cases did not engender such an attorney-client relationship with PP, so as to warrant the firm's disqualification for representing an adverse interest in the present case.

The trial court independently derived a second rationale for perceiving a disqualifying conflict in the firm's representation. The court reasoned that in the present litigation in which PP and LCP are on opposite sides, the firm cannot represent one of them (LCP) and also represent the club, "an aggregate of [the] two," without necessarily

representing "adverse interests." Otherwise put, "the firm cannot fairly represent the interests of both entities and at the same time defend one against the other." The court's conclusion, that representing the club as well as LCP in this case placed the firm in a position of conflict, requiring disqualification from representing the club, was flawed both legally and factually.

As previously discussed, the principles expounded in *Responsible Citizens*, *supra*, 16 Cal.App.4th 1717, foreclose the notion that by representing the club the firm also has an attorney-client relationship with PP because PP is a partner in the club. Under the facts advanced in the trial court, the firm's representation of the club does not give rise to any representation of PP. The trial court's expressed view of the club as "an aggregate" of PP and LCP contravenes the principle that lawyers engaged by a partnership represent and owe their professional obligations to the partnership entity itself, as distinct from its members, absent a contractual relationship with the latter. (*Id.* at pp. 1731-1732; rule 3-600(A), (D), (E).)

PP argues that, nevertheless, it clearly possesses an interest in the club, and indeed shares in the club's own interests. Therefore, says PP, the firm may not represent the club while representing LCP against PP, because to do so would risk slighting PP's interests in the club in favor of LCP's interests, and would tend to direct the firm's attention away from the club's own interests. This construct does not warrant disqualification of the firm, for several reasons.

First, the existence of conflicting interests constrains an attorney from representing more than one *client*. (Rule 3-310(C); see rule 3-610(E) [recognizing application of rule 3-310 to joint representation of a partnership and its member].) But again, the firm has no attorney-client relationship with PP. To say that the firm nonetheless must not represent the club because that representation may run counter to PP's interests in the club would be to impose a separate duty to adhere to PP's interests distinctly. But if that were required, no lawyer could represent the club in this case, in which PP is suing the club, contending it has acted in derogation of PP's interests by purchasing Hardie's PP

interest and adjusting PP's share in the club. Indeed, a duty to pursue the interests of each member of a partnership could pose an impossible task for any partnership attorney. (Cf. *Rose v. Summers, Compton, Wells & Hamburg* (Mo.App. 1994) 887 S.W.2d 683, 686.) California's concept that the client is the entity, not its members (e.g., rule 3-600(A)), in part responds to this reality. (Cf. *Greate Bay Hotel v. Atlantic City* (1993) 264 N.J. Super. 213 [624 A.2d 102, 106] ["Among the reasons for making the distinction between an organization and its members is the fact that at times the interests of the organization may conflict with those of individual members."].)

Second, the firm's representation in this case, as reflected by the record, does not embrace conflicting interests. The firm represents LCP and also the club, which has been managed by LCP (as majority venturer) throughout the transactions in question. PP has challenged the club's handling of its affairs in these transactions as violative of PP's legal rights (or interests), and seeks equitable relief against the club, to restore Hardie's units in PP, the assets the club paid for them, and PP's previous profit participation in the club. Like LCP and its defendant partners, the club disputes PP's position. As long as LCP retains the managerial interest in the club, as provided by its joint venture agreement, the club's posture in this case will remain aligned with LCP's and adverse to PP's. But the firm does not represent PP.

PP also contends that disqualification of the firm is supported by *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 (*Woods*). That case held that an attorney who for many years had represented a family corporation, and also had advised the wife (and drafted her will), could not serve as counsel for her husband in contested marital dissolution proceedings. The corporation was to be a principal subject of the proceedings: indeed, the wife had moved to join it as a party, and the attorney had filed an answer for both it and the husband. The court reasoned that "in representing an ongoing family corporation, Mr. Kralowec in a very real sense *continues* to represent wife. [¶] . . . [¶] . . . We believe Mr. Kralowec necessarily represents *both* husband's and wife's interests in his role as attorney for the family corporation. A corporation's

legal adviser must refrain from taking part in controversies among shareholders as to its control, and when his opinion is sought he must give it without bias or prejudice." (*Id.* at pp. 935, 936.)

Woods, supra, 149 Cal.App.3d 931, is distinguishable from the present case. The attorney in *Woods* had served, extensively, as general corporate counsel for a close corporation owned by the husband and wife. The wife had previously discussed the corporation's business with the attorney. (*Id.* at p. 933.) The Court of Appeal's perception that the attorney's corporate representation included representation of the wife may properly be understood not as recognition of a per se rule of constituent representation at odds with *Responsible Citizens*, *supra*, 16 Cal.App.4th 1717, but rather as a determination of attorney-client relationship consonant with the balance of the factors that *Responsible Citizens* identified as potentially determinative in the case of partnerships. These were, again, size of the business, nature and scope of the attorney's engagement, contacts between the attorney and the member, access to financial information relating to the member's interests, and circumstances implying an agreement not to appear adversely to the member. (*Responsible Citizens*, *supra*, 16 Cal.App.4th at p. 1773.) All of these factors appear to have pointed in favor of finding the attorney-client relationship the *Woods* court perceived. In contrast, the balance is distinctly different, as discussed above, as to the employee cases, and with regard to the present case. Here, unlike the attorney in *Woods,* the firm has served not as general legal adviser to the club, but rather as litigation counsel, in response to certain employees' and now PP's complaints.[4]

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[4] Responding to a November 2001 demand by PP's attorneys that the firm identify and describe all litigation since September 1999 in which PP or the club was a named party (excluding the present case), the firm's senior partner alluded, among other things, to the attorney-client privilege. PP contends that this somehow shows that the firm believes that its present representation of the club involves a conflict of interest. We see no basis for this perception.

We conclude that the firm's representation of defendants in this case does not violate the strictures against representing clients with conflicting interests. The trial court's disqualification of the firm must be reversed.

DISPOSITION

The order disqualifying attorneys is reversed. The stay of proceedings is terminated. Appellants shall recover costs on appeal.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.